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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

GLADYS L. BINDLEY, *Petitioner*,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

(Letters to left of paragraphs correspond with those in Rule 23.)

Gladys L. Bindley prays that a writ of certiorari issue to review the judgment of the Supreme Court of Missouri entered in the above entitled cause on April 11, 1960.

(a) The official opinion of the Supreme Court of Missouri is reported in 335 S.W.2d 64 and printed in Appendix A.

(b) April 11, 1960, is the date of the judgment sought to be reviewed and the time of its entry.

(II) Motion for a rehearing was overruled on May 9th, 1960. An order extending the time within which to

petition for certiorari was made on August 2nd to and including October 3rd, 1960.

(III) Section 1257 (3) of Title 28, U.S.C., is the statute believed to confer on this Court jurisdiction to review the judgment in question.

(c) Whether without notice or hearing dismissal by the trial court of petitioner's pending case on May 21st, 1956 (R. 34), and its order overruling of petitioner's motion to set aside the judgment of dismissal on February 23, 1959 (R. 75), deprived her of her property in her vested cause of action against respondent by denying to her the due process of law and equal protection of the laws, or either, guaranteed to all persons by the Fourteenth Amendment to the United States Constitution.

Whether newspaper notice of trial, the result of which was to be accorded finality and which was never seen or known of before the dismissal by petitioner or her counsel, notwithstanding they lived in the county and city in which the court without notice dismissed said cause and their names were on the records of said court so that they could have been notified by mail and thereby denied petitioner the rights aforesaid.

Whether the fact that the alleged newspaper notice described a list of cases (some 60 or 80), as cases filed in 1950 and therefore advised counsel that petitioner's case filed in 1947 was not included in said list so that said counsel was misled thereby and petitioner was by said incorrect notice deprived of the rights aforesaid.

Whether said judgment of dismissals without other than incorrect newspaper notice of a proceeding, which was to be accorded finality was in conflict with the law declared in *Mullane* v. *Central Hanover B. and T. Co.*, 339

U.S. 306-320 and *New York* v. *New York, New Haven, Hartford Railroad Company*, 344 U.S. 292, *Lambert* v. *California*, 355 U.S. 225 and like cases construing and applying said 14th Amendment to lack of notice of both law and fact. *Great Northern Railway Company* v. *Roosevelt County*, 332 P.2d 501, l.c. 505, also conflicts.

Whether failure by the Court officers to comply with the rules of trial court requiring notice of trial date violated petitioner's rights under the State and Federal law as outlined in *Rio Grande Irrigation and C Company* v. *Gildersleeve*, 174 U.S. 603, l.c. 608, holding

> "A duly authorized rule of court has the force of law and is binding on the court as well as upon the parties to an action, and cannot be dispensed with to suit the circumstances of any particular case."

Hill v. *Hawes*, 320 U.S. 520; *Meierhoffer* v. *Hansell*, 294 Mo. 195-206; *State ex rel. Wells* v. *Mayfield*, 365 Mo. 238 *en banc* as to dismissal without notice; *Hoppe, Inc.*, v. *St. Louis Public Service Company*, 361 Mo. 402 *en banc*, l.c. 406, denied petitioner's rights aforesaid.

Whether failure by such court officers to comply with an older and unrepealed court rule 14 as to notice providing:

> "Notice of at least four weeks of settings on the trial calendars of jury cases shall be given to attorneys of record both by publication in The Daily Record and by written notice mailed by the Clerk of the Assignment Division on a form prescribed by the Court."

which rule is quoted in the opinion (335 S.W.2d l.c. 67-68) as in force in May, 1956, was justified by the consideration that at an informal conference of which there was no record, the circuit court *en banc* decided that they would clean up the docket of old cases (some 6000 other old

cases) and made new rules without repealing the old which new rules effective January 9, 1956, provided for newspaper notice of trial dates only and made no provision for notice by mail and newspaper publication was made incorrectly as to this case so that counsel was misled by the incorrect notice and the provisions of even the new or old rules were not followed.

Whether, since "the disposition of those actions was undertaken in accordance with alleged long recognized non-statutory powers inherent in trial courts to dismiss cases for failure to prosecute with diligence" in accordance with "the inherent right and power of a court, of its own motion and independently of statute or court rule, to dismiss an action for failure to prosecute" (335 S.W.2d 69), was a custom and usage of the Missouri Courts in direct violation of the Missouri Constitution (*Elks Investment Company* v. *Jones*, 187 S.W. 71 l.c. 74 and statute section 1 R.S. Mo. 1949) adopting the common law of England which statute commanded that when not repugnant to or inconsistent with existing law said Common Law

> "* * * shall be the rule of action and decision in this state, any custom or usage to the contrary notwithstanding"

and of which statute the Court has ruled (*State* v. *Rader*, 262 Mo. 117, l.c. 129:

> "It is the rule in this State by our solemn statute as well as by all of the holdings of our courts, that the common law is in force and that it shall be the *only* rule of decision, unless, and until it has been abrogated and changed by the statute itself."

Whether such custom and usage in the exercise of alleged non-statutory powers by the courts of Missouri repealed or nullified said statute adopting the common law

of England deprived petitioner of her property right in her vested cause of action, for

> "Custom never repeals a valid law, *common* or statutory, designed for the protection of the public."

In view of the law stated in *Shaffer* v. *Carroll*, 309 Mo. 438, *en banc*; *Friese* v. *Railroad*, 290 Mo. 501, *en banc*:

> "* * * such a custom, if it existed, could not have the effect to abrogate the statute mentioned." Affirmed Friese v. Railroad, 263 U.S. App. 1".

Whether the common law rule that, in the absence of a statute, as here, or rule of court. the court has no power to dismiss a case "for mere inaction of plaintiff no matter how long continued". (*Meloy* v. *Keenan*, 17 App. D.C. 285 (Court of Appeals District of Columbia where common law was in force was in force as in Missouri); the highest court of Rhode Island in *Coates* v. *Coleman*, 51 A.2d 81, l.c. 82; *Levy* v. *Gerhard*, 60 A.2d 494, l.c. 495; *Sayles* v. *McLaughlin*, 7 A.2d 779, conflicts with the decision herein.

In *Meloy* v. *Keenan* the action was begun in 1884 and no action taken by plaintiff until 1900 when case was dismissed and reversed for violation of common law rule.

In *Sayles* v. *McLaughlin* the case was pending for twenty four years and was dismissed and reversed on the same ground as *Meloy* v. *Keenan* and the same principles applied in the other cited cases.

The opinion of the court below (335 S.W.2d 69) seeks to establish that petitioner had notice though conceding that she did not. It states though it had no such inherent power either at common law or by statute.

> "In the first place we believe, under the circumstances here shown, when considered in the light of

the inherent power of the court above set forth in dismissal of actions for want of prosecution, the notice published from May 15, 1956, through May 21, 1956, was reasonably calculated to apprise plaintiff of the setting of the cause for trial and an apportunity to present her objections".

The United States Court of Appeals for the District of Columbia, in which District the Common Law of England is in force (*Kendall* v. *U. S.*, 12 Peters 524, from Maryland); in *Meloy* v. *Keenan*, 17 App. D.C. 235, reversed the decision of the trial court dismissing a case begun in 1884 and dismissed in 1900. The dismissal was for failure to prosecute. In reversing the appellate court ruled:

> "There is no statute or rule of court having the force of a statute requiring a cause to be brought to trial within a given period, under penalty of forfeiture of further prosecution".

In *Sayles* v. *McLaughlin*, 7 A.2d 779, the court following *Meloy* v. *Keenan* as its strongest support ruled—"at common law in England—there was no such proceeding in the courts of common law as the dismissal of an action on motion of a defendant." The case had been pending twenty four years without action by plaintiff. Said the court (Syll. 2)

> "The fact that plaintiff did nothing about his action for trespass quare clausem fregit for more than 20 years after it was brought did not authorize its dismissal for want of prosecution • • •
>
> Delay before the institution of an action at law, no matter how long, is not a bar except by the operation of a statute of limitation, and we have great difficulty to say the least in understanding why it should be any more fatal after the institution of an action except by operation of a statute."

Coates v. *Coleman*, 51 A.2d 81, l.c. 82 and *Levy* v. *Gerhard*, 60 A.2d 494, l.c. 495, have both followed *Sayles* v. *McLaughlin* (brought twenty four years before dismissal) and both holding that mere delay on the part of plaintiff did not authorize dismissal *for want of prosecution*.

In *Suess* v. *Motz*, 220 Mo. App. 32, l.c. 37, it is said:

> "• • • it is definitely settled in this State that a judgment of dismissal and a judgment of nonsuit serve the same purpose and have the same legal effect and arrive at the same end, and hence are treated alike and allowed the same office in every day administration of the law".

In *Mason* v. *Railroad*, 226 Mo. 212, the court sustained defendant's motion to dismiss. In reversing the Supreme Court ruled l.c. 221:

> "• • • in Haldeman v. United States, 91 U.S. 584, it was held that the entry of a judgment 'that the suit is not prosecuted and be dismissed' is nothing more than the record of a nonsuit."

In *Slocum* v. *New York Life Insurance Co.*, 229 U.S. 364, l.c. 392, this court said:

> "A nonsuit at common law was a dismissal of the plaintiff's action without an adjudication other than the imposition of costs, and constituted no bar to another action for the same cause."

In *Perrin* v. *Wilson*, 9 Mo. 149, it is said:

> "The judge of the Court of Common Pleas derives no authority from the common law, or the statutes of this state to compel a plaintiff in his court to take a nonsuit."

In *Clark* v. *Steamboat Co.*, 9 Mo. 146, it was said l.c. 147:

> "The common law is introduced by our statutes into this state and by it no plaintiff can be forced to take a non suit".

Tidds' Practice, 2nd Am. Ed., p. 920, states:

> "The plaintiff is in no case compellable to be non-suited".

> "If a statute was necessary to limit the time for instituting an action it would be even more clearly necessary to limit the time in which plaintiff could bring it to trial". *Sayles* v. *McLaughlin*, 7 A.2d 779 l.c. 783.

In *English* v. *Scott*, 1 Mo. 495, plaintiff suffered a non suit. Said the court:

> "The only inquiry is whether a non suit and a judgment thereon is a decision".
> The court ruled that it was.

Those courts also held that if a Statute of Limitations is necessary as to commencing actions it is more necessary to have a statute of limitations as to time of trial to authorize dismissal in view of the common law maxims that "an action never dies" *Jones* v. *Ry.*, 18 Ga. 247, 252) and that "At common law a right of action which had once accrued was immortal" (*Brooklyn Bank* v. *Barnaby*, 197 N.Y. 210, 227). For originally there was no statute of limitation to actions either at the Common or Civil law. *Blackmore* v. *Tidderly*, 92 Reprint 228; *Gray* v. *Ins. Co.*, 6 Fed. Cas. No. 3,375; 1 Blatch, (U.S.) 280, 287; Burdick Principles of Roman Law and their relation to modern law p. 520. Sohm's Institutes (2nd Ed. 298, 300); The Institutes of Justinian, by Sanders (Lib. IV, Tit. XII), pp. 557, 558.

Whether the denial of the benefit of the Statute adapting the common law was a denial of the equal protection of the laws guaranteed by the 14th Amendment.

Whether the court erred in applying the equity rule of laches invoked by respondent to petitioner's action at law in view of the fact that in Missouri "To an action at law laches is no defense" (*Brooks* v. *Roberts*, 281 Mo. l.c. 558).

Whether the judgment rests on a non-federal ground adequate to support it in view of Section 511.250 authorizing motion to set aside a judgment for irregularity within three years thus extending the common law rule on the subject as outlined in *Cross* v. *Gould*, 131 Mo. App. 585, l.c. 594, 597, approved and followed in an unbroken line of cases as pointed out in *White* v. *Huffman*, 304 S.W.2d 909, l.c. 911. Want of notice of *trial* is an irregularity at common law (Tidds' Practice Pac. 561, Second American Edition).

Whether petitioner's motion to set aside also authorized the issuance of a writ of error *coram nobis* (*Crabtree* v. *Ins. Co.*, 341 Mo. 1173).

Whether judgment of dismissal was void authorizing motion to set aside without limit as to time. *Wenzel* v. *Wenzel*, 283 S.W.2d 882, l.c. 885.

Whether decision on first appeal (358 Mo. 31) denying respondent's claim as to Statute of Limitations on ground that Section 1026, R.S. Mo., 1939, now Section 516.230, R.S. Mo. 1949, extended the limitation statute one year during which this action was refiled so that the "dismissal without" prejudice did not authorize the filing of another action after the dismissal of 1956 (358 Mo. 84).

Whether the dismissal was interlocutory (335 S.W. 2d l.c. 69) and deprived petitioner of "no right inuring

to her under the 14th Amendment," 335 S.W.2d l.c. 70 in view of *Beasley* v. *Texas & Pacific Railway Co.*, 191 U.S. 492, 494; *State ex rel.* v. *Goodrich*, 159 Mo. App. 422; *Moormeisher* v. *Hannibal*, 180 Mo. App. 717, l.c. 722.

Whether the judgment of dismissal reciting that "the parties having been duly notified fail to appear" and "therefore" dismissal without prejudice at plaintiff's costs (R. 34, 335 S.W.2d 66) prevented respondent without a cross appeal from successfully contending that (contrary to the 14th Amendment), "The trial court had the inherent power to dismiss this action *without notice* for failure to prosecute." (R. 129). *State ex rel.* v. *Drainage District*, 271 Mo. 429 *en banc; State ex rel.* v. *Palmer*, 198 S.W.2d 10, *en banc; Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185; *Standard Acc. Ins. Co.* v. *Roberts*, 132 F.2d 794 (C.A. 8): "Since appellee's contentions seek to change or add to the relief accorded by the judgment which was in their favor, they can raise such issues here only by a cross appeal".

Another question is whether all the Missouri decisions follow the alleged custom. They do not. For the judgment sought to be reversed is contrary to the law of Missouri in all other cases on the point. For since May, 1956, many judgments have been rendered by the Missouri Courts holding that such courts have power to dismiss "So long as the legal requirements of notice are fulfilled" (*Bryan Doughby* v. *Railroad*, 291 S.W.2d 119 at l.c. 122). "Courts are to be commended for their efforts to keep their dockets current, but care must be exercised to see that orderly procedure and due process of law is not sacrificed in so doing". *Levee District No. 4 of Dunklin County* v. *Small*, 281 S.W.2d 614, 619; *Magerstaff* v. *LaForge*, 303 S.W.2d 130 at l.c. 134. The three cases cited in the opinion 335 S.W.2d 69 in support of the alleged custom

and usage of Division 1 of the State Supreme Court "of its own motion and independently of statute or court rule to dismiss an action for failure to prosecute" directly contradicts said statement. For *Guhman* v. *Grothe*, 346 Mo. 427, was not dismissed on the "court's own motion" but on defendant's motion and also because the petition did not state a cause of action and on other grounds. Of course plaintiff in that case had notice because the opinion states that record did not "show any indication by appellant upon consideration of the motion to dismiss of a willingness to prosecute the action." (l.c. 430). In *City of Jefferson* v. *Capital Oil Company*, 386 S.W.2d 65, 68 (2), the opinion shows that the court held that *Meloy* v. *Keenan*, 17 App. D.C. 285, was cited but because the case was dismissed on motion and notice authorized by Section 510-140, R.S. Mo. 1949, the common law rule did not apply. In *Crispin* v. *St. Louis Public Service Co.*, 361 Mo. 866 at l.c. 869, it is stated that "following the rule of the Bindley case we must hold that the dismissal here on the Court's *own motion without motion of defendant* or notice that the court would act or be requested to act to dismiss the case for that reason is not a dismissal with prejudice." The judgment of dismissal was reversed.

(d) The part of the 14th Amendment to the United States Constitution herein involved is:

> "• • • nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

Sec. 1.010, R.S. Mo. 1949, so far as here involved is:

> "The common law of England and all statutes and acts of parliament made prior to the fourth year of James the First and which are of a general nature, not local to that kingdom, which common law and

statutes are not repugnant or inconsistent with the Constitution of the United States, the constitution of this state, or the statute laws in force for the time being, shall be the rule of action and decision in this state, any custom or usage to the contrary notwithstanding."

(e) In the opinion of the Supreme Court of Missouri (358 Mo. 31-39) reversing a judgment of dismissal, from which petitioner appealed, facts material to the consideration of the questions presented are stated (R. 20-33). Said opinion described the action as one wherein petitioner sought to recover for loss of her property and rights, to-wit: a cause of action for the wrongful death of her husband and insurance benefits from respondent. Said opinion and judgment of reversal established that petitioner had a vested cause of action of which she should not have been involuntarily deprived. For "a vested cause of action is property and is protected from arbitrary interference." (*Pritchard* v. *Norton*, 106 U.S. 124, 132). *Gebbes* v. *Zimmerman*, 290 U.S. 326, 332. "An existing right to recover damages is property which the state has no right to destroy." *Angle* v. *Ry.*, 151 U.S. 1; Cooley, Constitutional Limitations, 7th Ed., 517. "The right to damages to be recovered in a civil action is property and passes to one's representatives at his death." *Griffin* v. *Wilcox*, 21 Ind. 370, l.c. 373. Hence petitioner was deprived thereof by the state courts contrary to the due process and equal protection of the laws provisions of the United States Constitution. (14th Amendment).

After reversal the mandate of the Supreme Court was filed in Division 1 of the Circuit Court of Jackson County, Missouri, at Kansas City, on September 30th, 1948. No action was taken by said Division of said court to obey the mandate or set said cause for trial. After the Court

en banc decided, without making any record entry, to clean up the old cases on the general docket and adopting the new rule enforceable on January 9, 1956, providing for notice of trial to parties by newspaper notice only and omitting all provision for notice by mail, engaged in publishing newspaper notices contrary to the provisions of the new and old rules. Petitioner's case was filed in 1947 and on being dismissed without notice or hearing which dismissal was reversed on that ground a notice was published in the Daily Record dated February 8th, 1956, that a list of cases filed in 1947 would be assigned to Division 3 of said court "for trial" (R. 37). That said list began with No. 518,670 and ended with 519,766 and that petitioner's case numbered 519,292 was not included in said list but was omitted, and when plaintiff's counsel saw that it was not included in said list he correctly assumed that it was still in Division 1 (R. 37). Thereafter on May 15th The Daily Record contained the following item:

"Notice

Assignment Division

The following cases are assigned to Division No. 3 for trial on Monday, May 21, 1956, at 9:30 A. M.

(Filed in 1950) (R. 35).

When said counsel saw said notice of May 15, 1956, of assignment of some cases for trial, and in view of the court rule requiring that cases be listed and published for trial in numerical order, he was misled by the recital that said list of cases referred to cases that were filed in 1950 and not in 1947, so that notice to petitioner of trial was never given as required by court rules, the law of Missouri and the 14th Amendment (R. 37, 38). Said cause was so dismissed without any notice to plaintiff or her counsel

notwithstanding their names were on the record in this case and their offices were in the Dierks Building, Kansas City, Missouri, since the action was begun (R. 35). According to the Assignment Clerk the case was transferred to the General Docket on May 2, 1956, without notice, at the request of some counsel (not plaintiff's) (R. 62). The opinion ignores the publication of February 8th and omits mention thereof and states that what was stated in petitioner's motion to set aside the judgment of dismissal was stated with reference to the notice for trial on May 21, 1956, after the words "And further" (335 S.W.2d 67), and further states that though the court "cannot take judicial notice of the rules of the Circuit Court of Jackson County" yet that the court knows what was done pursuant to the rules which it did not and could not know. Exhibits 5 and 6 show the list of cases in The Daily Record for May 21, 1956, and it also shows this case was not in its numerical order. The opinion states:

> "In the motion here presented counsel for plaintiff admits that he read in The Daily Record a portion of the notice setting this case for trial on May 21, 1956, and seeks to avoid any prejudicial effect of his failure to read *all of it*, because at the top thereof it referred to a series of cases filed in 1950, and when he had scanned the notice to the point where, in numerical order, this case should have appeared he cast the notice aside." (335 S.W.2d 70).

This case did not and could not appear in numerical order in said list of cases filed in 1950 because it was filed in 1947 as counsel was notified.

The opinion concedes that because of the incorrect method of giving notice on the part of the officers of the court, counsel was not notified and decides that though the

incorrect publication of notice of trial caused said lack of notice yet that petitioner must suffer the loss of her property right in her vested cause of action because of the fault of the court and the officers both as to the notice and in giving effect to its alleged unlawful custom and usage in violation of the statute adopting the common law of dismissing pending cases of its own motion independently of statute or court rule.

(f) The federal questions were raised in the motion to set aside (R. 35, 41) and it is established by the opinion that said questions were duly raised on appeal in the Supreme Court of Missouri which opinion demonstrates that said questions were erroneously decided.

The fact that not only the parties hereto are interested in the questions here involved but the thousands of other parties, whose rights were sacrificed after the same fashion, are necessarily interested so that there are special and important reasons for granting the right by this court in the exercise of its sound discretion. Furthermore the fact that 27 C.J.S., Dismissal and Nonsuit, par. 65 (1), pp. 430-432, is cited in the opinion (335 S.W.2d 69) as authority for the rule as to "The inherent right and power of a court, of its own motion and independently of statute or court rule to dismiss an action for failure to prosecute is universally recognized". It is apparent that such universal recognition of a custom and usage is in direct conflict with the provision that Common Law of England "shall be the rule of action and decision in this state, any custom or usage to the contrary notwithstanding". In *Johnson* v. *Fleuetsch*, 176 Mo. l.c. 468, it is stated:

> "Rules of Interpretation and construction are derived from the common law and since that law constitutes the foundation and primarily the body and

> soul of our jurisprudence, every statutory enactment is construed by its light and with reference to its cognate principles." (Sutherland on Stat. Con., Sec. 289).

And since the common law "constitutes the foundation and primarily the body and soul of our jurisprudence" and also the body and soul of the jurisprudence of America, then, since a decision of this court on that question might affect the body and soul of the jurisprudence of this country then this is a case which concerns the nation and hence there are special and important reasons for granting the writ.

> "The law itself must save the parties' rights, and not leave them to the discretion of the courts as such." (Coe v. Armour Fertilizer Works, 237 U.S. 413, l.c. 425.)

In *Soller* v. *Holland Furnace Company*, 337 S.W.2d 87, the opinion herein has been cited and quoted as authority for reversing an order of a trial court setting aside a judgment of dismissal which was without notice. So that the question in this case is not limited to the interests of the parties hereto but threatens the fundamental rights of all litigants in Missouri and if followed in other states menaces the nation. Hence comes within the principle stated in rule 19 that the writ will be granted "where there are special and important reasons therefor".

Wherefore, your petitioner prays that a writ of certiorari under the seal of this court be directed to the Supreme Court of Missouri commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Supreme Court of Missouri and of the case numbered and entitled on its docket No. 47518, Gladys L. Bindley v.

Metropolitan Life Insurance Company, a corporation, respondent, to the end that cause may be reviewed and determined by this court as provided by the statues of the United States and that the judgment of the Supreme Court of Missouri be reversed and for such further relief as to this court may seem proper.

Dated September 28, 1960.

PAUL E. BINDLEY,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

APPENDIX A.

GLADYS S. BINDLEY, Appellant,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation, Respondent.

No. 47518.

Supreme Court of Missouri, Division No. 1.

HOLLINGSWORTH, Judge.

Plaintiff has appealed from a judgment of the Circuit Court of Jackson County (sitting in Kansas City) denying her motion to set aside an order dismissing her amended petition without prejudice, in which petition she had sought to recover from defendant the sum of $10,000 actual and $115,000 punitive damages. The asserted right of reversal of the judgment is predicated upon grounds that the order of dismissal without prejudice was void, in that it was entered without notice, contrary to the provisions of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Plaintiff's action was originally brought on January 6, 1943, subsequent to the death of her husband on August 26, 1939, on which latter date he was the holder of a policy of life insurance issued by defendant, Metropolitan Life Insurance Company, for the face amount of $1200, with the additional provision for payment of double indemnity benefits if his death should be caused by accidental means. The amended petition alleged an unlawful conspiracy en-

tered into by Metropolitan, its agent and its physician (both of the latter being now dead and against whom the action has abated by reason of nonrevivor) for the purpose of cheating and defrauding plaintiff of her rights and property, to wit: (1) a cause of action for the wrongful death of her husband by means of the negligent administration of an allegedly excessive amount of ether by Metropolitan's physician and (2) the right to recover the double indemnity benefits provided in the aforesaid policy, together with penalties and attorneys' fees for vexatious refusal to pay the same. (The transcript reveals, however, that all policy benefits have been finally adjudged and paid.)

The record shows that on April 1, 1946, the trial court unqualifiedly dismissed the action for want of prosecution. It seems that thereafter, on March 26, 1947, the action was again filed and again, on motion of defendants, unqualifiedly dismissed. Upon appeal to this court, we held, under the facts shown, that the order of dismissal should have been without prejudice and, on July 12, 1948, reversed and remanded the cause. See Bindley v. Metropolitan Life Ins. Co., 358 Mo. 31, 213 S.W.2d 387. The mandate was received and filed in the circuit court on September 30, 1948. The cause thereafter lay dormant on the docket of the Circuit Court of Jackson County for nearly eight years until May 21, 1956, when it was dismissed without prejudice for want of prosecution.

At the hearing of the instant motion to set aside the dismissal of May 21, 1956, Edwin G. Bush, deputy clerk of the circuit court en banc and the assignment division thereof (Division No. 1), called as a witness by plaintiff, identified certain "Rules of the Circuit Court," including Rule 14, to which we will revert. He testified that the provisions of Rule 14 were not followed in dis-

posing of the instant case (and some 6000 other "old cases") for the reason that the members of the court en banc, at an informal conference of which there was no record, decided "they would clean up the docket of those old cases" and that "Judge Hunter was good enough to take them on, so we made a blanket order assigning all [of these old cases] to Division No. 3, and whatever notices were given, were given after they come into Division 3 * * *."

Pursuant to that arrangement, Division No. 1, on May 2, 1956, made the following order in the case: "Now on this day it is ordered by the Court that this cause be and the same is hereby returned to the General Docket," and notice thereof was published in The Daily Record on Friday, May 4, 1956.

On May 11, 1956, the following entry was made:

> "Now on this day it is ordered by the court that the following numbered and entitled causes be and the same are hereby assigned to Division No. 3:
>
> "* * * * * *
>
> 519292 Gladys L. Bindley v. Metropolitan Life Insurance Company.
>
> * * * * * *"

After the cases referred to in the order of May 11, 1956, reached Division 3, The Daily Record (a newspaper officially designated for dissemination of reports of action taken in court proceedings, legal notices, etc.) published on Tuesday, May 15, 1956, and each day thereafter, excepting Sunday, May 20, 1956, through May 21, 1956 (a total of six publications), the following:

"N O T I C E

ASSIGNMENT DIVISION

"The following cases are assigned to Div. No. 3 for trial on Monday, May 21, 1956, at 9:30 A.M. (Filed in 1950)

"* * * * * *

545814 Opal Lockwood versus Clyde Lockwood same. Sol Yarowsky

519292 Gladys L. Bindley vs. Metropolitan Life Ins. damages; Martin O'Donnell

545827 James Edward Smith vs. Linnie Belle Smith divorce; Wm. Pevehouse

* * * * * *"

Thereafter, on May 21, 1956, Division 3 made and entered its order of dismissal of the cause, reading as follows:

"Now on this day in each of the following numbered and entitled causes, the parties hereto having been duly notified fail to appear.

"It is therefore ordered and adjudged by the court that said causes be and the same are hereby dismissed without prejudice and that said defendants recover of plaintiff their costs and that execution issue therefor.

"* * * * * *

519292 Gladys L. Bindley vs. Metropolitan Life Ins. Company

* * * * * *"

The record shows that probably, in the regular course of business, the order of dismissal was published in The Daily Record following the date of its entry.

On January 21, 1959, two years and eight months after the cause was dismissed without prejudice, plaintiff filed

the instant motion to set aside that order. Attached thereto were the affidavits of plaintiff and each of her counsel reciting they had no notice or knowledge of the placing of the cause on the peremptory call set in Division 3 on May 21, 1956. The motion alleged the provisions of Rule 14 of the circuit court (portions of which are hereinafter set forth) and the failure to comply therewith, and further

> "That this cause (the amended petition) was filed in the year 1947 while the alleged published notice referred to cases filed in 1950 and did not comply with the provision of Rule No. 14 requiring cases to be called for trial in their numerical order and that the cases described as the 'following cases' filed in 1950 began with cause No. 545,431 and ended with cause No. 546,270, while the above case is numbered 519,292 and was inserted between causes No. 545,814 and No. 545,827 so that when plaintiff's counsel read the said notice he was misled or rather he was advised thereby that cause No. 519,292 filed in 1947 was not included in the list of cases so published so that neither plaintiff nor her counsel had any notice that the above numbered cause was assigned to Division No. 3 for trial on Monday, May 21, 1956."

And further:

> "The above numbered cause, to wit: 519,292 was not included in the said list but was omitted between Nos. 519,277 and 519,292 and that when plaintiff's counsel saw that it was not included in said list of cases he correctly assumed that it was still pending in Division No. 1 and when he saw the list published to have been assigned for trial on May 21, 1956, he was misled by the recital that said list of cases referred to cases that were filed in 1950, and not in 1947, so that the notice to him was never given."

Rule 14 deals essentially with the *active trial list*. It provides, insofar as is deemed pertinent:

"The Presiding Judge shall, as deemed necessary, cause to be published in the Daily Record * * * and posted in the Assignment Division and in the office of the Circuit Clerk, a notice requiring parties or their attorneys to file with the Clerk of the Assignment Division on or before a date therein fixed, a separate listing card of each case between the numbers stated in such notice, which is at issue and trial of which is desired. * * * All cases triable to the Court shall be listed in accordance with published notification.

"A sufficient number of jury cases to be known as the active trial list, shall be published in The Daily Record * * * under the direction of the Presiding Judge in order that the attorneys engaged therein may have reasonable notice of the proximity of any case for trial. The Bar shall be charged with notice that cases may be added to such published list after The Daily Record * * * for any particular day [goes] to press and shall keep informed of such additions so made. Cases on the active trial list shall be tried in their regular numerical order except as may be necessary because of engaged counsel or other proper cause."

Another section of an older Rule 14 provides:

"The Clerk of the Assignment Division, under the direction of the Presiding Judge, shall arrange settings of 'Weekly Trial Calendars' and enter thereon causes listed for trial in the numerical order of the filing of such causes and causes shall be assigned for trial, so far as practical, in the order in which they were filed with the Clerk of the Court, * * *.

"Notice of at least four weeks of settings on the trial calendars of jury cases shall be given to attorneys of record both by publication in The Daily Record and by written notice mailed by the Clerk of the Assignment Division on a form prescribed by the Court, * * *."

Plaintiff's essential contention is that the court erred in overruling her motion to set aside the judgment of May 21, 1956, dismissing her action without prejudice, for the reason:

"That the only alleged notice of trial was newspaper notice which neither plaintiff nor her counsel ever saw or knew of and, whereas they were, to the knowledge of defendant, the circuit court and its assignment clerk, residents of Kansas City and could have been notified by mail of the alleged trial date but were not so notified. It follows that plaintiff was deprived of her adjudged property right in her cause of action without due process of law contrary to the command of the 14th Amendment to the United States Constitution."

Obviously and, it seems, purposefully, the dismissal of May 21, 1956, was not made pursuant to Circuit Court Rule 14. (Concededly, it was not made in accordance with the provisions of Section 510.140 RSMo 1949, V.A.M.S., prescribing the procedure for hearing and determination of *motions filed by defendant* to dismiss for failure of plaintiff to prosecute his action.)

Defendant's position is that in 1956 the Circuit Court was confronted with disposing of some 6000 cases, which had lain dormant on the docket of the Kansas City Circuit Court for many years—some, or at least plaintiff's, since 1948; and that the disposition of those actions was undertaken in accordance with long recognized non-statutory powers inherent in trial court to dismiss cases for failure to prosecute with diligence.

In support of her contention that the procedure followed in the dismissal of her case was violative of the due process clause of the Federal Constitution, plaintiff has cited and stressed the following cases: Mullane v. Central

Hanover Bank and Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865; City of New York v. New York, New Haven & Hartford R. Co., 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333; Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178; Orrick v. Orrick, Mo. App., 233 S.W.2d 826; and Meierhoffer v. Hansell, 294 Mo. 195, 243 S.W. 131. Before discussion of them it is well to note, however, that they deal primarily with the validity of initial notices of new proceedings wherein initial notice is a prerequisite of due process to the exercise of jurisdiction over the *res* or person sought to be subjected to judicial process. The holding in each of those cases may be briefly summarized as follows:

In Mullane, a trust company, in accordance with the banking laws of New York, gave notice by publication of its petition filed in the Surrogate's Court for judicial settlement of its trust accounts in some 113 estates. The Supreme Court, under the facts shown, held the notice was insufficient to vest the trial court wih jurisdiction over certain beneficiaries interested in said trusts and that the decree affirming the settlement was violative of the 14th Amendment. In so holding, the court, 339 U.S., loc. cit. 314, 70 S.Ct., loc. cit. 657, 94 L.Ed., loc. cit. 873, said: "An elementary and fundamental requirement of due process *in any proceeding which is to be accorded finality* is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Cases cited.] The notice must be of such nature as reasonably to convey the required information, [Case cited] and it must afford a reasonable time for those interested to make their appearance, [Cases cited]. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional re-

quirements are satisfied. 'The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.'" (Emphasis supplied.)

In City of New York, the court held that notice by publication to creditors to file claims in a railroad reorganization proceeding under the Bankruptcy Act, 11 U.S.C.A. § 205, on pain of being denied participation was ineffective to bar the claim of a city having a tax lien on certain parcels of railroad property. In Walker, the court held, in a condemnation proceeding by a city against a landowner, that notice of proceedings to determine his compensation given him by publication was not adequate as required by due process. In Orrick, the court merely held that an application for an order of service by publication was insufficient to warrant such an order and that purported service by publication thereunder was void. In Meierhoffer, it was held that under the rules of the Jackson County Circuit Court the trial division acquired no jurisdiction until an order had been made by the assignment division assigning the cause for trial to a trial division. (Such an order was made in the instant case. See order of May 11, 1956, supra.)

Those cases, as we read them, are not applicable to the situation we here have under consideration. The Circuit Court of Jackson County has had jurisdiction of the parties and subject matter of the instant action for more than thirteen years and the proceeding questioned on this appeal involved only an interlocutory order of dismissal without prejudice; it adjudicated no personal or property right of plaintiff whatever. See Crispin v. St. Louis Public Service Co., 361 Mo. 866, 237 S.W.2d 153, 155[2, 3].

[1] The inherent right and power of a court, of its own motion and independently of statute or court rule, to dismiss an action for failure to prosecute is universally recognized, 27 C.J.S. Dismissal & Nonsuit § 65(1), pp. 430-432; and it has long been so recognized in Missouri. Guhman v. Grothe, 346 Mo. 427, 142 S.W.2d 1, 2; City of Jefferson v. Capital City Oil Co., Mo. App., 286 S.W.2d 65, 68[2]; Crispin v. St. Louis Public Service Co., 361 Mo. 866, 237 S.W.2d 153, 155. This rule was expressly recognized on the first appeal of this case, 213 S.W.2d loc. cit. 389, 391, wherein this court said: "We do not question the inherent power of the court to dismiss a cause, on its own motion, for want of prosecution, * * *."

We are convinced that the provisions of the rules of court hereinbefore set forth are not controlling or dispositive of this appeal. This for the reasons following:

[2-4] In the first place we believe, under the circumstances here shown, when considered in the light of the inherent power of the trial court above set forth in dismissal of actions for want of prosecution, the notice published from May 15, 1956, through May 21, 1956, was reasonably calculated to apprise plaintiff of the setting of the cause for trial and afford her an opportunity to present her objections. Mullane, supra, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865, 872. This court knows that "The Daily Record" is a medium generally used by the circuit courts of Jackson County for transmitting notice and by lawyers for obtaining notice of orders made in connection with the cases pending in said courts. It is hardly conceivable that the Bar of Kansas City did not know, from its daily reading of The Daily Record, that in 1956, the circuit court was engaged in clearing its dockets of "old cases"; and it would seem that general knowledge of that fact alone would charge plaintiff (actually, her counsel)

with the duty, in the exercise of reasonable care, carefully to read each listing in its entirety to ascertain whether her case, which had lain dormant since 1948, was or soon would be listed for disposition. In the motion here presented, counsel for plaintiff admits that he read in The Daily Record a portion of the notice setting this case for trial on May 21, 1956, and seeks to avoid any prejudicial effect of his failure to read *all of it*, because, at the top thereof, it referred to a series of cases filed in 1950 and when he had scanned the notice to the point where, in numerical order, this case should have appeared, he cast the notice aside. When we bear in mind, first, the foregoing facts and, second, the duty of a party to keep abreast of all proceedings in his case from and after service of original process until *final judgment*, Cohen v. Ennis, Mo., 318 S.W.2d 310, 316, we think the trial court could well have found that the notice here challenged was sufficient to apprise plaintiff of the setting of her case for trial on May 21, 1956.

[5] In the second place, let us assume, however, that under the facts here shown plaintiff was not chargeable with notice of the setting of her case on May 21, 1956, yet more than two and one-half years elapsed before she took any step to reinstate it. (We have searched the record in vain for any evidence as to when she obtained actual notice of the dismissal.) These facts, without explanation, bespeak such a continuing failure on the part of plaintiff to prosecute her action as to warrant, without more, the overruling of her tardy motion to reinstate.

[6] But further assuming that, upon receipt of actual notice, plaintiff promptly filed her motion to set aside the dismissal without prejudice, the duty was squarely upon her to show at the hearing thereof that her failure to appear on May 21, 1956, was not by reason of negligence

and, more important, to show that she had not failed diligently to prosecute her action from the time of its remand in 1948 up to the time of the filing of her motion. Levee District No. 4 of Dunklin County v. Small, Mo. App., 281 S.W.2d 614, 617 [6-10]; 27 C.J.S. Dismissal & Nonsuit § 81, p. 499. She made no such showing at the hearing.

Thus it is clear that the order of dismissal without prejudice made on May 21, 1956, deprived plaintiff of no right inuring to her under the due process clause of the 14th Amendment. It is also clear that the only order which finally deprived her of the right to further prosecute the cause was made after full hearing on plaintiff's motion to set aside that order, at which hearing the evidence conclusively showed that plaintiff had continuingly failed to prosecute the cause with diligence from the date of remand in 1948 until the order made on February 23, 1959, refusing to set aside the dismissal made on May 21, 1956.

Under the facts shown, we have no hesitancy in holding that the trial court did not err in overruling plaintiff's motion.

The judgment is affirmed.

All concur.